THE POWER OF THE STATE TO GRANT LANDS UNDER NAVIGABLE WATERS TO THE ABUTTING UPLAND OWNER. — A recent case in New York, while not raising the point squarely, has discussed the power of the state to grant lands under navigable waters to the abutting upland owners. *People* v. *Steeplechase Park Co.*, 113 N. E. 521. The statute under which the particular grant in question was made provided that the commissioners of the land office should have power to grant so much of the lands under navigable waters as they should deem proper for the beneficial enjoyment of the same by the adjacent owners.[1] Apparently, then, the legislature considered its power of disposal to be unrestricted. The court did not clearly indicate its opinion.

As the grant in the principal case was made to the abutting owner the question of the state's power to destroy by a grant of the shore whatever rights the littoral owner as such may have was not raised.[2] The discussion was rather concerning the nature of the state's ownership with reference to the public rights, which are, in the main, those of navigation and fishing.[3] Since, then, the statute affects public and not private property, there is no constitutional restriction on the action of the legislature save that found in the grant to the federal government of the power to regulate commerce.[4] Yet if the rule laid down in the great majority of the decisions in this country is adopted, the power of the legislature is restricted to grants for the benefit of navigation and commerce or for some other public purpose.[5] The common expression is that the state holds the title of lands under navigable waters in trust for the public benefit.[6] There is, however, authority for the statement that the power of the legislature is in no way restricted and that it may grant to whomsoever it chooses for whatsoever purpose.[7]

In following the trust doctrine, the courts purport to lay down a rule of property law to the effect that the soil under navigable waters "is not the proper subject of ownership in the sense that it can be sold and disposed of as private property," [8] and therefore the state, having

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[1] N. Y. PUBLIC LAND LAWS § 75, CONSOL. LAWS, ch. 46, art. 6.

[2] For a discussion of this question, see 18 HARV. L. REV. 341. Also Stevens *v.* Paterson & Newark R. Co., 34 N. J. L. 532.

[3] GOULD, WATERS, 3 ed., ch. 4.

[4] It is well settled that Congress has ultimate and superior jurisdiction over navigable waters that are "avenues of commercial intercourse with other States." 1 WOOD, NUISANCES, 3 ed., § 473.

[5] The leading case is Illinois Central R. Co. *v.* Illinois, 146 U. S. 387. See especially pp. 452–53. Matter of Long Sault Development Co., 212 N. Y. 1, 105 N. E. 849. In People *v.* B. & O. R. Co., 117 N. Y. 150, 156, 22 N. E. 1026, 1027, Gray, J., said that the only restriction on the power of the legislature in this connection was that it should be used "in the direction of public utility."

[6] See People *v.* N. Y. & S. I. F. Co., 68 N. Y. 71, 78, where the court said: "The State in the place of the crown holds the title as trustee of a public trust."

[7] Langdon *v.* Mayor, etc. of City of New York, 93 N. Y. 129. The trust doctrine is not applied in Massachusetts. Commonwealth *v.* Boston Terminal Co., 185 Mass. 281, 70 N. E. 125. See also Stevens *v.* Paterson & Newark R. Co., 34 N. J. L. 532, 550, *per* Beasley, C. J.: "The principle seems universally conceded that . . . the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute." For a statement of the law in the various states, see Shiverly *v.* Bowlby, 152 U. S. 1, 18, and following; GOULD, WATERS, 3 ed., § 56, and following; and 59 L. R. A. 33, 43, n.

[8] 18 HARV. L. REV. 362. In Illinois Central R. Co. *v.* Illinois, *supra*, the court says

a limited title, can grant no more than it has. If the ownership of the state is not complete, the courts mean either that entire dominion is impossible in the nature of things, or that the ownership though full is divided between the state and the public. But surely there is nothing in the nature of things to prevent the state or a private individual from holding as complete a fee in land under navigable waters as they may in any realty. The second alternative must be their real meaning. Yet merely to establish a rule of property law does not check the legislature, for the latter body may change rules of property subject to constitutional restrictions. Consequently to set a so-called rule of property law in the teeth of legislative act not constitutionally prohibited is to impose on the law-making body a court-made constitutional limitation, protecting public property in a way analogous to that in which private property is protected by the Fourteenth Amendment. That such constitution-making is quite unjustified does not need argument; that it is inexpedient is only the less clear. For it would seem that the administration of the natural highways of commerce is a matter best left in the hands of the legislature, composed of the representatives of the public whose rights are in question. Control of these agents is the proper means of securing the most beneficial disposition, from the public's point of view, of the natural highways of intercourse. Whether one public use should yield to another, or whether private ownership should be restored, are hardly justiciable questions.

The courts even in the jurisdictions supporting the trust doctrine should be slow to find that the legislature has exceeded its powers; for the determination of what is a public purpose is clearly one for the legislative branch of the government on considerations of time, place, and circumstances. The question before the court is identical with that which arises under the Fourteenth Amendment when the legislature is dealing with the power of eminent domain. The courts should act only if it is clear that the legislatures have acted unreasonably.[9]

EQUITABLE RELIEF AGAINST INJURIOUS FALSEHOODS. — A recent case presents in an interesting form the old problem as to the possibility of equitable relief against injurious falsehoods. *Howell* v. *Bee Publishing Co.*, 158 N. W. 358 (Neb.). At an early stage in the gubernatorial campaign the plaintiff had made public a statement declining to be a candidate for office and giving his reasons. Subsequently, however, he became an active aspirant for the Republican nomination. On the day before the primary election, the defendants, a daily newspaper of wide circulation, published the plaintiff's former declination under the headlines: "HOWELL WILL NOT RUN. HIS ANNOUNCEMENT EXPLAINING WHY HIS FRIENDS SHOULD NOT CAST THEIR VOTES FOR HIM." The Supreme Court reversed and dismissed the order of the District Court granting an interlocutory injunction. The majority opinion is rested squarely on

in speaking of the title to lands under navigable waters: "But it is a title different in character from that which the State holds in lands intended for sale."

[9] See the dissenting opinion in Matter of Long Sault Development Co., 212 N. Y. 1, 24, 105 N. E. 849, 856.